

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-04-0327 FCD GGH P

vs.

STEVEN MICHAEL KELLY,

Movant.

ORDER

Movant, a federal prisoner proceeding pro se, has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On December 4, 2009, respondent filed a motion to dismiss on grounds that this action is barred by the statute of limitations. On January 8, 2009, the magistrate judge granted movant a thirty day extension of time to file an opposition to this motion. Thirty days passed and movant did not file an opposition. Accordingly, on March 30, 2009, the magistrate judge ordered movant to show cause within twenty days why the motion to dismiss should not be granted.

Movant did not file a response to the March 30, 2009, show cause order. Accordingly, on June 2, 2009, the magistrate judge recommended that the motion to dismiss be

1 granted. The findings and recommendations contained notice to all parties that any objections to
2 the findings and recommendations were to be filed within twenty days. Neither party has filed
3 objections to the findings and recommendations.

4 Although it appears from the file that movant's copy of the findings and
5 recommendations were properly served, they were returned unserved on June 15, 2009. On June
6 16, 2009, the findings and recommendations were re-served. On June 29, 2009, the findings and
7 recommendations were again returned unserved. On July 22, 2009, the findings and
8 recommendations were again re-served. This time, they were not returned unserved.
9 Presumably movant received the findings and recommendations.

10 On July 13, 2009, movant filed a letter with the court requesting that he be
11 permitted to resubmit his appeal. In this letter, movant mentions respondent's motion to dismiss
12 and states that he (movant) did not have access to the necessary resources. It is unclear whether
13 movant is claiming that he could not file a timely § 2255 motion or a timely opposition to
14 respondent's motion to dismiss due to inadequate access to necessary resources. In any event,
15 movant's letter does not explain his failure to file an opposition or his failure to respond to the
16 show cause order. The letter is clearly not a response to the findings and recommendations as
17 they had not yet been received by movant at the time he filed the letter. Accordingly, the court
18 does not consider the letter in evaluating the findings and recommendations.

19 The court has reviewed the file and finds the findings and recommendations to be
20 supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY
21 ORDERED that:

- 22 1. The findings and recommendations filed June 2, 2009, are adopted in full;
23 2. Respondent's December 4, 2008, motion to dismiss (no. 45) is granted;

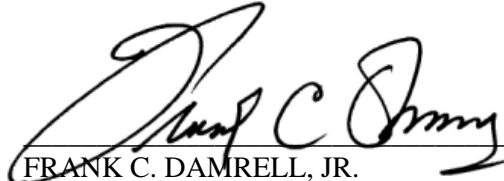
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3. The Clerk of the Court is directed to close the companion civil case, No. CIV
S-08-1503 FCD GGH.

DATED: September 10, 2009.



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE